SADIE SCHOONOVER

IBLA 84-398 Decided October 5, 1984

Appeal from the decision of the New Mexico State Office of the Bureau of Land Management denying an application to defer the performance of annual assessment work on 37 mining claims.

Affirmed.

1. Mining Claims: Assessment Work

An application for deferral of the performance of annual assessment work on a group of mining claims by one who asserts partial ownership is properly rejected where, despite litigation in progress between the rival claimants, there is no legal impediment to access and the claims are purportedly being mined by another owner of a partial interest who has filed affidavits of performance of assessment work for that period. Alleged threat of harm by the person in possession is insufficient reason for the Secretary to defer assessment work where a court has issued an order authorizing the applicant's representative to enter the claims for the purpose of accomplishing such work.

APPEARANCES: Steven C. Ewing, Esq., Albuquerque, N. M., or appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Sadie Papa Schoonover appeals from the February 16, 1984 decision by which the New Mexico State Office of the Bureau of Land Management denied her petition to defer the performance of annual assessment work on certain mining claims for the assessment year ending at 12:00 o'clock meridian on September 1, 1983. Her petition was filed pursuant to 30 U.S.C. § 28b (1982) and 43 CFR Subpart 3852.

We note initially that although Schoonover's amended petition described 37 claims, BLM's decision was captioned to identify only those claims with serial numbers NMMC 71046 through NMMC 71058. We assume that this was merely inadvertent, and that BLM intended the decision as a denial of the petition in toto; and we proceed on the basis of that assumption.

Appellant's petition is based upon certain allegations recited in the complaint which she filed in the District Court for the Seventh Judicial District, County of Socorro, State of New Mexico, captioned Schoonover v. Barber et al. v. Papa et al., CV-82-48. This complaint alleges that one Sero Papa was the owner of an undivided half interest in the subject unpatented claims; that he died on June 9, 1978; that he was unmarried, left no devisees and died intestate; that he is survived by six sisters (including appellant Schoonover) and one brother (Henry Papa); that pursuant to the laws of intestacy of the State of New Mexico the surviving sisters and brother were entitled to share in the decedent's estate; that notwithstanding the entitlement of the sisters, their brother, Henry Papa, had taken possession and control of all of the assets of Sero Papa's estate and had refused to make an accounting or pro rata distribution of such assets; that Henry Papa and others had extracted valuable minerals from the claims and are continuing to mine them; that subsequent to Sero Papa's death Henry Papa filed annual proofs of labor in his name only. The complaint asks, inter alia, that the Court impose a constructive trust or resulting trust on the assets of the estate of Sero Papa held by Henry Papa.

In her petition for deferment, Schoonover alleged, "As of September 1982, Petitioner and her agents have been prevented from verifying whether the assessment work has been performed and have been prevented from performing and denied access to perform assessment work on the above described claims because of the pending litigation between the parties in cause No. CV-82-48 * * *." However, the petition also states, "All assessment work on the claims for all prior years have (sic) been performed * * *."

BLM denied the petition for deferral of assessment work on two grounds.

First, BLM held that the petition was untimely filed. The attorney for Schoonover wrote the BLM office on August 26, 1983, saying, in part, "During our [telephone] conversation you advised me that a formal petition for deferment was not necessary, therefore, please consider this as our petition for deferment of performance of assessment work for a period of one year." That letter was received by BLM, according to the mail room receipt stamp, at 11:14 A.M. September 1, 1983, forty-six minutes prior to the expiration of the assessment year for which deferment was requested. On September 16, 1983, BLM returned the petition letter because it did not comport with the requirements of 43 CFR Subpart 3852, in that no filing fee had been paid, notice had not been recorded, and the necessary information had not been provided. On December 1, 1983, a proper petition was filed with BLM. That was rejected by BLM's decision partly because BLM held: "A petition to defer assessment work, to be effective, must be filed within the time period in which the work must be performed, in this case September 1, 1982 to August 31, 1983," 1/ and the amended petition was three months late.

1/ BLM erred somewhat in this regard. The assessment year, by statute, runs from "12 o'clock meridian [noon] on the 1st day of September * * *." 30 U.S.C. § 28 (1982). Therefore, appellant's letter/petition, having been received before noon, was within the current assessment year, rather than one day late.

BLM's second ground for denying the petition was on the merits of the petition. The decision held that although Schoonover alleged that she was denied access to the claims because of litigation, that litigation, in fact, had been initiated by her, and did not prevent her access.

Appellant argues that the filing of the petition was timely and that BLM should have given her an opportunity to cure any deficiencies, citing Andrew Freese, 50 IBLA 26 (1980). Moreover, she contends, when she cured those deficiencies by filing her amended petition, the amended petition should relate back to the original filing, citing Rhinehart Berg, 71 IBLA 131 (1983).

It will not be necessary for the Board to address the foregoing issues, or other issues concerning the time of filing an adequate petition in such cases, as we decide the appeal on the merits of the amended petition.

[1] We note, as did BLM, that appellant was not prevented from entering the claims by reason of litigation, the litigation having been initiated by her in a complaint which indicated no obstacle to her access. However, in response to her complaint, Henry Papa and the other defendants moved the Court for a preliminary injunction against the plaintiffs ordering them to cease and desist from entering upon any of the subject claims. The record before us does not show the Court's disposition of this motion, but the Court did issue the following order:

> IT IS ORDERED AS FOLLOWS:
>
> 1. Dr. John MacMillan is authorized to go onto and inspect the various properties and mining claims to verify whether or not the annual assessment work has been performed.
>
> 2. If the Proofs of Labor on all mining claims described in the complaint are not filed in the appropriate county and BLM offices by Friday, 13 August 1982, Dr. John MacMillan is hereby appointed as the Receiver in this cause to perform all labor required on the claims and file Proofs of Labor thereon in the appropriate offices by no later than 12 Noon on 1 September 1982.

Upon the filing of appellant's statement of reasons for this appeal, appellant's counsel appended thereto his own affidavit, which states in part:

> 2. Since the referenced lawsuit was filed Sadie Schoonover and her representatives have been denied access to view and perform work on the claims by Henry Papa and his representatives except for one occasion. On that one occasion Mrs. Schoonover after a court hearing in which Henry Papa and his representatives were present, obtained a Court Order allowing Dr. John MacMillian to examine the claims (Record on Appeal). However, despite the Court's Order and despite the Court's instructions to the defendants that they cooperate with Dr. MacMillan, Henry Papa ordered Dr. John MacMillan off the land and threatened bodily harm if he did not do as directed.

3. Because of the defendant's refusal to cooperate with Mrs. Schoonover and her representatives, she has been denied access to the claims

Appellant has not alleged that there is no means to enforce compliance with the Court's order which was issued upon her motion for her benefit and clearly provided her representative with a legal right of access to the claims for the purpose of confirming or performing the assessment work. No explanation is provided concerning why, armed with such an order, appellant and her representative allowed themselves to be deterred by an alleged verbal threat, without further recourse.

Further, the Board notes that appellant has petitioned the Court to impose a constructive or resultant trust on the claims, and has alleged to the Board that the defendants have performed the assessment work and are engaged in mining the claims. It appears to the Board that if she is successful in her lawsuit, the work done by the defendants in the case will enure to her benefit and that of the other plaintiffs, at least to the extent of their respective interests. The law does not require the annual performance of $100 in work for each claim by each holder of a fractional interest therein.

In summation, it does not appear that appellant was legally prevented from access to the claims; that her representative had express authority for such access by virtue of the order of a court of competent jurisdiction; that the assessment work was done, or probably done, in any event; and that if she is finally held to be the owner of the interest she is asserting, her rights will be protected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Gail M. Frazier
Administrative Judge